



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 1, 2003

Ms. Sara Schulz Koehn  
Schwartz & Eichelbaum, P.C.  
7400 Gaylord Parkway, Suite 200  
Frisco, Texas 75034

OR2003-2224

Dear Ms. Koehn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178664.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for eighteen categories of information relating to an investigation of alleged sexual harassment by a named district employee. The requestor is an attorney representing the employee. You state that the district will provide the majority of the requested information to the requestor. You claim, however, that information relating to interviews of students by district administrators is excepted from disclosure under sections 552.101, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1).<sup>1</sup> "Education records" means those records that contain

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<sup>1</sup>Personally identifiable information includes, but is not limited to: (a) the student's name; (b) the name of the student's parent or other family member; (c) the address of the student or student's family; (d) a personal identifier, such as the student's social security number or student number; (e) a list of personal characteristics that would make the student's identity easily traceable; or (f) other information that would make the student's identity easily traceable. 34 C.F.R. §99.3 (2000).

information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under FERPA and section 552.114 of the Government Code. Open Records Decision No. 539 (1990). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 of the Government Code provides:

[The Public Information Act] does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

FERPA protects information to the extent “reasonable and necessary to avoid personally identifying a particular student,” or “one or both parents of such a student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978).

The submitted documents pertain to the district’s investigation of sexual harassment complaints made by students against the district employee at issue. The documents are “records that contain information directly related to a student” and constitute education records under FERPA. In addition to statements given by students to district administrators, you have submitted consent forms completed by district parents indicating whether a student’s parent authorizes the district to release the student’s statement to the requestor. *See* 20 U.S.C. § 1232g(b) (providing for parental consent for release of education records). You state, and the documents reflect, that most of the parents at issue did authorize the district to release their children’s statements to the requestor. We note, however, that one parent declined to provide consent to release her child’s statement. Furthermore, you have not provided consent forms pertaining to three other students appearing in the documents. We determine that, pursuant to section 1232g(b) of FERPA, the district must release the statements of students whose parents consented to disclosure. However, the identifying information of other students appearing in the statements to be released, as well as the identifying information of students appearing in the remainder of the submitted documents, are confidential pursuant to FERPA and must be withheld. We have marked the information that the district must withhold under FERPA.<sup>2</sup>

Next, you inquire whether the submitted documents are excepted from disclosure pursuant to privacy. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy.<sup>3</sup> Common-law privacy protects information if (1) the information

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<sup>2</sup> Based on this finding, we do not reach your argument under section 552.135 of the Government Code.

<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The information at issue pertains to a sexual harassment investigation. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Here, because there is no adequate summary of the investigation, the submitted documents are generally subject to disclosure. However, the identities of victims and witnesses to the alleged sexual harassment are protected by common-law privacy. *See Ellen*, 840 S.W.2d at 525. In this case, as you acknowledge, the parents of several students whose identities would be protected under common-law privacy pursuant to the decision in *Ellen* have consented to the disclosure of the students' identities and statements to the requestor. When an individual voluntarily discloses otherwise private facts in a public forum, the individual's privacy interest in that information is waived. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 58 (Tex. 1992); *see also Indus. Found.*, 540 S.W.2d at 685. In this case, the district parents who consented to the release of their children's statements waived the common-law privacy protection for these statements under *Ellen*. The district inquires whether the statements of students whose parents have consented to disclosure must nevertheless be withheld pursuant to the common-law privacy interest of the other students at issue. We determine that identities of the students whose parents did not consent to disclosure are adequately protected by FERPA in this case, as discussed above.

Finally, we note the requestor's contention that the employee at issue has a special right of access to information relating to the employee. Under section 552.023 of the Government Code, a person has a special right of access to information that is excepted from public disclosure under laws intended to protect the person's own privacy interest as the subject of the information. Gov't Code § 552.023. In this case, the information that is confidential pursuant to FERPA must be withheld to protect the privacy interest of the students and parents who did not consent to disclosure. Accordingly, we determine that the employee does not have a special right of access to such information.

In summary, we have marked the information that the district must withhold pursuant to FERPA. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 178664

Enc: Submitted documents

c: Mr. Tony Conners  
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(w/o enclosures)